Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1977

FREDERICO RODRIGUEZ,

Petitioner,

against

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P. N.,

Respondent.

LUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING LINE, LTD.,

Respondent.

SRECKO BARULEC,

Petitioner,

against

OVE SKOU, R. A.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Petitioners, Frederico Rodriguez, Luis Perez and Srecko Barulec, pray that a Writ of Certiorari be issued to review the decisions and judgments of the United States Court of Appeals for the Second Circuit decided March 19, 1980, affirming the orders of the District Courts for the Southern District of New York dismissing the personal injury actions brought by Petitioners against shipowners.

At the time of the argument of the appeal in the *Rodriguez v. Compass Shipping Co. Ltd.* case, in the Court of Appeals, Second Circuit, the Petitioners' Luis Perez and Srecko Barulec appeals as well as two other appeals entitled *Juan Hernandez v. Costa Armatori, S.P.A., "PIA COSTA"* and *Leonard DiFazio v. Jugoslavenska Linijska Plovidba "VISE VICA"* were consolidated for the purpose of arguing the appeals together since they all involved the same questions of law. The judgments of the District Courts with respect to all cases were affirmed for reasons stated in the *Rodriguez v. Compass Shipping Co. Ltd.* case. Judgments to that effect were entered by the Circuit Court on March 19, 1980.

Opinions Below.

The Opinion of the Court of Appeals in *Rodriguez v. Compass Shipping Co. Ltd. and Djakarta Lloyd, P.N.* is not officially reported and is made a part of the Appendix B to this Petition. The Opinion of the United States Court of Appeals for the Fourth Circuit in the case of *Caldwell v. Ogden Sea Transport, Inc.* decided March 27, 1980 is not yet officially reported. Pertinent portions of said *Caldwell* Opinion is printed in the Appendix A to this Petition.

Jurisdiction.

The judgments of the United States Court of Appeals for the Second Circuit were entered on March 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Diversity of citizenship and damages exceeding the jurisdictional amount were the bases for Federal jurisdiction in the court of first instance.

Questions Presented For Review.

1. When there is a statutory assignment to an employer of the right to bring a third party action under Section 33(b) of 33 U.S.C. 933(b) and the employer fails or refuses to prosecute the third party action, does such failure constitute a waiver of the employer's rights under the assignment and is the right to sue deemed reassigned to the injured workman?

2. Where there is a conflict of interest between the employer and employee, and the employer fails or refuses to sue a third party for its negligence do equitable considerations require that the Act be interpreted so as to permit the injured workman to sue the third party even though more than six months elapses from the date of payment of an award in a compensation order?

3. Are the applicable purposes of the Statute 33 U.S.C. 901 *et seq.* for the employer to recoup its loss occasioned by the payment of compensation and for the injured employee to have the right to sue a negligent third party for damages and should such purposes be considered in interpreting the Act; should such purposes be considered in judging the harshness of depriving the injured workman of his right to sue and to benefit the negligent third party?

4. Does a claims examiner who is a designee of the Deputy Commissioner, not the Director of OWCP, have the power to enter a compensation order within the meaning of 33 U.S.C. 933(b) in view of 20 CFR sec. 701.301(a),801.2(a) and the 33 U.S.C. 908(i) (A)?

Statute Involved.

The statutory provision involved is the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §933(b):

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *or Board* shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Statement of the Case.

Rodriguez v. Compass Shipping is one of a group of cases in which a longshoreman brings an action to recover damages for personal injuries sustained on board shipowner's vessel due to the negligence of the shipowner. Claim was also made for Workmen's Compensation benefits.

In *Rodriguez* the accident occurred September 4, 1973. On November 4, 1974 the parties in the compensation case settled the claim at an informal conference before a claims examiner. The disposition of the claim was to be "by the issuance of a compensation order." The employer was to make payment promptly following the conference "without regard to the receipt of the formal compensation order." Such agreement was set forth in a U. S. Department of Labor form and signed by the plaintiff, his representative, the representative of the employer and the claims examiner. The latter was a designee of the Deputy Commissioner to hold an informal conference. He was not a designee of or authorized to enter an order by the Director of the O.W.C.P. Payment of the agreed-upon amount was made promptly. No formal compensation order embodying the agreement was made or filed.

On July 2, 1977 the action to recover damages was commenced against shipowner and bare-boat charterer.

In *Perez v. Arya National Shipping Line, Ltd.*, the accident occurred August 30, 1973. A compensation order was entered on March 24, 1975 and on July 7, 1976 action was commenced against shipowner.

In *Barulec v. Ove Skou R.A.* the accident occurred on January 6, 1975. A Memorandum of Informal Conference was prepared and signed by the claims examiner on February 11, 1976, and action was commenced February 22, 1978.

In all three cases the employer did not commence an action against shipowner.

In all cases defendants moved for summary judgment based on plaintiff's failure to sue within six months of the "settlement agreement" as allegedly required by 33

U.S.C. §933(b). Such motions were granted and on appeal to the Circuit Court the lower Courts' decisions were affirmed with one opinion under the title of *Rodriguez v. Compass Shipping Co. Ltd.* applying to all cases.

The Decision in *Rodriguez.*

In *Rodriguez v. Compass Shipping Co., Ltd.*, the Court held that where a Claims Examiner convened an informal conference at which the parties agreed to a settlement, memorialized on a form signed by a Claims Examiner, it was deemed an "award in a compensation order" satisfying the requirement of 33 U.S.C. §933(b). The 6-month period provision of said Section was triggered by such "award." This was held to be so even though there was no formal compensation order filed.

The Court further held that the purpose of the filing of an order was to insure that claimant-employee knew he was foregoing his right to sue. Where an employee signs a compensation agreement he is fully aware of his rights including his right to sue within six (6) months. (This holding has no basis in fact.) The failure of an administrator to comply with the formality imposed by not filing a formal order can have no significance as far as substantive rights of parties are concerned.

The Court further held that with a valid assignment, the right to sue is exclusively that of the employer six (6) months thereafter if the employee fails to sue during that time, unless within reasonable time the employer joins in the action or ratifies its commencement.

The Court strictly construed said Section 33(b) to the detriment of the employee's rights, since they did not view the six-month time bar as unreasonable or harsh. The strict construction here resulted in the benefit to

shipowners at the employee's expense and was contrary to the purposes of the act. The Court refused to apply the equitable principles set forth in *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956) claiming that the six-month provision and the 1972 Amendment eliminating the employer's liability to a shipowner under principles of *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956) eliminated the basis of a conflict of interest.

The Court held however that "the employee has an interest conflicting with that of the employer, which often chooses not to antagonize its customer, the shipowner, by bringing a law suit against it. See *Valentino v. Rickners Rhederei G.M.B.H.,* 552 F.2d 446 (2d Cir. 1977)" (12b).* Despite such a finding of a conflict of interest they chose to limit *Czaplicki* to the peculiar fact situation there presented and refused to apply its equitable principles.

Of interest is the Court's admission that its decision is in conflict with the Fifth Circuit and the Circuit Court D.C. stating:

> "Although *Czaplicki* was applied in a few cases postdating the 1959 amendments to the Act, see e.g., *McClendon v. Charente S.S. Co.,* 348 F.2d 298 (5th Cir. 1965); *Potomac Electric Power Co. v. Wynn,* 343 F.2d 295 (D.C. Cir. 1965), we prefer, in view of the later changes in the Act, to treat *Czaplicki* as limited to its unique facts, which are not presented here" (13b-14b).

The Fourth Circuit in the case of *Caldwell v. Ogden Sea Transport, Inc.* (and five other cases consolidated on that

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*Number with letters following refer to pages in Appendix A and B, annexed hereto.

appeal) was decided March 27, 1980 which is directly contrary to and in conflict with *Rodriguez*. The Second Circuit knew that the Fourth Circuit was considering its decision on its appeal a long time before *Rodriguez* was argued.

Reasons for Granting the Writ.

It is submitted that this court should exercise its discretion and grant a review on writ of certiorari because of the following special and important reasons:

There is a conflict between Circuit Courts as to the meaning and effect of 33 U.S.C. 933(b). There is also a conflict between *Rodriguez* and the Supreme Court holdings which interpret the L.H.W.C.A. as well as a conflict with the purposes of the Act. To resolve the conflict and to further the proper administration of the Act, the granting of this Writ of Certiorari is urgently requested.

The Statute provides for a statutory assignment of an injured employee's right to sue a third party six months after an award in a compensation order where he fails to sue during that period of time. It provides for an incentive to the employer to sue the third party to the extent of retaining, out of the recovery, not only its compensation lien plus attorney's fees and expenses, but also 20% of the sum collected. The employee retains the economic benefit to the balance of the recovery. 33 U.S.C. Sec. 933(e).

The Statute fails, however, to provide for the eventuality should the employer fail to sue.

Until the 1972 Amendments to the L.H.W.C.A., 33 U.S.C. 901 *et seq.*, the courts generally permitted employees to sue the third party after the six month period

from the date of a compensation order on the theory of conflict of interest between the employer and employee.

The Supreme Court in *Czaplicki v. The Hoegh Silvercloud, supra,* stated that in a very real sense the injured employee has an interest in his right of action even after it has been assigned. That normally the employee's interest would not be inconsistent with that of the assignee who would want to recoup the payments made in compensation. "In giving the assignee exclusive control over the right of action, however, we think that the Statute presupposes that the assignee's interest will not be in conflict with those of the employee and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is a recovery. Here, where there is such a conflict of interest, the inaction of the assignee operates to defeat the employee's interest in any possible recovery." In such circumstances, the Court stated that the Statute should be construed to allow the employee to enforce, in his own name, the rights of action that were his originally. Where there is a conflict of interest and inaction by the assignee, the employee should be allowed to sue since that is the proper way to insure him the rights given by the compensation act, namely, to secure his statutory share in the proceeds of any action.

The Second Circuit strictly limited an employee's right to sue to a period of six months. They ignored the purposes of the Act and that the L.H.W.C.A. should be interpreted broadly in favor of the injured longshoreman who should be permitted to prove his case against the shipowner to recover damages against him arising out of the latter's negligence or fault. See *Edmonds v. Compagnie Generale Transatlantique,* _____ U.S. _____, 47 L.W 4868 (#78-479, 6/27/79) and *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977). The Second Circuit chose instead a narrow statutory construction thereby

defeating an injured employee's rights to the benefits he is entitled to under the act; relieving shipowner of its responsibility for the results of its negligence; and shifting to plaintiff, the burden of a loss occasioned by the fault of shipowner.

In *Potomac Electric Power Co. (PEPCO) v. Wynn, Jr.*, 343 F.2d 295 (D.C. Cir 1965) the Circuit Court analyzed the amended statutue post 1959. There an employee received an award in compensation and thereafter commenced an action against PEPCO two weeks before the expiration of the three year statute of limitation. PEPCO moved to dismiss the complaint claiming that by statutory assignment the employee was no longer the real party in interest as more than six months elapsed since the award. The Circuit Court denied the motion to dismiss making the following rulings:

1) The Longshoremen's and Harbor Workers' Act must be construed liberally in favor of the injured employee.

2) In 1959 the Act was amended to enlarge the rights of the employee. The amendments provided a financial incentive for the employer to take vigorous action against the third party by allowing the employer to retain one-fifth (1/5) of the proceeds recovered in excess of his expenses and lien. This financial incentive was to encourage the employee to permit assignment of his action in order to enlist the superior resources of the employer in suing the third party.

3) If the employer fails to sue after the statutory assignment, the employee should not be required to produce evidence regarding the employer's motives as such a burden would be inconsistent with the underlying

purposes of the 1959 Amendment—to facilitate the employee's recovery against the third party.

4) The statute is not designed to protect third parties from suit but an important purpose is to safeguard the employer's right to recoupment.

5) This purpose of recoupment by the employer does not require the court to penalize the employee if the employer declines to sue the third party. In effect, the employer's declination amounts to a waiver of the protection offered by the statutory assignment.

6) The Act's purposes to benefit the employee as interpreted by *Czaplicki v. The Hoegh Silvercloud,* 351 U.S.525 (1956) and supplemented by the 1959 Amendments support the view that the employee may bring suit against a third party whenever it is evident that the employer, for whatever reason, does not intend to bring suit.

7) There is no reason in law or equity why an injured employee's rights against a tort feasor should be sacrificed on the alter of the employer's self interest.

In commenting on the Supreme Court's decision in *Czaplicki, supra,* the Circuit Court in *PEPCO* said that the Statute presupposes that the assignee's interest will not be in conflict with those of the employee. Where there is a conflict and inaction by the assignee, the employee can maintain the third party action himself.

It should be noted that the Senate Committee Report 92-1125 pertaining to the 1972 amendments to the Longshoreman and Harbor Workers' Act at page 3 reports that there was some discussion with respect to continuing said Act as the Workmen's Compensation statute

covering workmen employed in private industry in the District of Columbia. The Committee Reports state that representatives of such employees stated that these workers desired to continue coverage under said Act. By its action, Congress agreed.

The D.C. Circuit Court has within its district possibly the greatest number of employees affected by this Act. It therefore had more than just a passing interest in the matters discussed in Potomac. That case was decided in 1965 and was in effect and the prevailing law in 1972. When the hearings were held on the question of amending 33 U.S.C. 901, et seq., Sec. 933(b) pertaining to the statutory assignment was not changed and it must have been assumed that the interpretation of that section was as set forth in *PEPCO*.

It was surely not within the contemplation of all parties concerned with the amendments to the Act that a new interpretation would be given to the statutory assignment and the effect of the conflict of interest. The change from *PEPCO* to *Rodriguez* has deprived injured employees of a substantial right. There has been much said and written of the compromises resulting in the Amendment to the Act in 1972. There is constant reference to a quid pro quo. Nothing at any time was said of a quid pro quo for the giving up of such substantial right.

The courts had held that an employee may sue shipowner as long as there is no formal order and as long as the employer indicates that he will not sue or act upon the statutory assignment. Everyone assumed that the law was fixed and changes would be statutory in nature—open and known. The employees of the District of Columbia actually requested their Workman's Compensation coverage be continued under the Act. To now find that workmen have lost an established right when no such loss

was contemplated or intended at the time of the Amendment, is to destroy the foundation of statutes based on compromise. The District of Columbia workers had a right to assume that under the Act they would continue to have their rights as set forth in *PEPCO*. If a loss of such rights was involved, they would not have expressed a desire to continue to be covered by the Act and at least would have said something about it in opposing such change.

The Supreme Court in *Edmonds v. Compagnie Generale Transatlantique, supra,* pointed out that the legislative history of the Act strongly counsels against the modification of longshoremen's pre-existing rights against the negligent vessel. The questions presented here in this petition were not raised at the time of the debates leading to the 1972 Amendments.The Court then quoted from *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977) at 278-279:

> "Consequently, as we have done before, we must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial act. . . '

The Court in *Edmonds* likewise held that a court changing what Congress understood to be the law and which it did not wish to modify might disturb the delicate balance of the compromises arrived at resulting in the 1972 Amendments. The courts should, therefore, stay their hand under such circumstances, since one must presume that Congress acted with the existing state of the law in mind and not the probability of future judicial change.

The Third Circuit in *Johnson v. Sword Line, Inc.,* 257

F.2d 541 (3 Cir. 1958) held that where no satisfactory reasons for an employer's inaction was shown, a conflict of interest would have to be presumed and, therefore, the statutory assignment was not a bar to the employee's action.

By the passage of the 1972 Amendments, Congress did not intend the result claimed by the Second Circuit here. Actually, the Court's opinion and conclusion is contrary to Congressional intent. The Senate Committee report states at page 11 that a vessel may not, by contractual agreement or otherwise, require the employer to indemnify it in whole or in part for damages for which it is liable to an injured workman; that vessels by their superior economic strength could circumvent and nullify the provisions of the Act by requiring indemnification from a covered employer for employee's injuries.

Thus, the economic relationship which results in a contribution from stevedore to shipowner, as here, and penalizes the longshoreman in the process is against public policy and void.

The Congressional Committee reports and statute recognize shipowner's economic power over the stevedores and in legislating that there should be no indemnity or contribution by stevedore to shipowner, made it clear that there should be none directly or indirectly.

Despite the foregoing shipowner is indirectly receiving contribution, contrary to law as a result of stevedore's failure to sue. Despite the foregoing the economic power wielded by shipowners makes stevedores not sue under the statutory assignment. The court in *Rodriquez* found that because of the economic relationship between shipowner and stevedore, the latter would not sue. Since the longshoreman has an 80% interest in the recovery (after

payment of the lien and expenses) a conflict of interest does exist between employer and employee.

In *Cella v. Parternreederi M.S. Ravenna,* 529 F.2d 15 (1 Cir. 1975) the First Circuit stated the sense of the statutory purpose to be:

> "—to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of the increased benefits under the Act." *Cella, supra,* 529 F.2d at 20.

Perhaps the most surprising thing of all is that under the foregoing, with the statutory purposes and objectives clearly spelled out, the steamship company still seeks to benefit at the expense of the longshoreman and stevedore by undercutting Congressional intent and statutory purpose and the Second Circuit upholds them in doing so. Shipowner is the one that claims that plaintiff lost his rights to sue defendant and that the stevedore is the only one that can sue—knowing full well that stevedore will never sue—or more correctly, dare not sue. It is stevedore that has the right to intervene in the action and to raise the question of assignment of the cause of action. Shipowner is not the third party beneficiary for such assignment. By Act of Congress they are liable for their negligence without any foreshortened Statute of Limitations whether sued by the longshoreman or the stevedore. They seek to choose their adversary. They should not, under these circumstances, have the right to make such choice by raising the question of assignment to defeat a longshoreman's claim.

If they seek to protect themselves from a multiplicity of lawsuits, they should move to join the employer in the action under F.R.C.P. 17a.

The *Rodriguez* opinion and decision came down on March 19, 1980. Eight days later on March 27, 1980, the Court of Appeals, Fourth Circuit, decided *Caldwell v. Ogden Sea Transport, Inc.*, a post 1972 Amendment case (1a-12a). It involved the identical questions of law decided by the Second Circuit in *Rodriguez*. The Fourth Circuit took the diametrically opposite position as to the purpose of the Act, the equitable considerations to be applied, the philosophy of the law involved, and the conclusions reached as to the interpretation and application of the Act and in particular, Section 933(b) thereof. It refused to restrict *Czaplicki* to its peculiar facts.

The Fourth Circuit stated:

> "LHWCA should be interpreted broadly in favor of the injured longshoreman. *E.g., Voris v. Eikel,* 346 U.S. 328, 333 (1953). One of its objectives is to place "the burden ultimately on the company whose default caused the injury," *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964), and a negligent shipowner would seem to have no complaint if that burden is placed upon it by the longshoreman rather than the employer or its insurer" (2a).

Where there is a statutory assignment to the employer, the statute does not deal directly with a solution to the problem where the employer fails to bring an action.

> "*While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's substantive right might be lost simply through inaction of the assignee until the claim is barred from*

> *prosecution by anyone.* What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason" (8a-9a). (Italics supplied.)

The Fourth Circuit did not reject or restrict *Czaplicki* as the Second Circuit did but sought to apply its equitable principles. The Court stated:

> "The fundamental point in *Czaplicki* is that notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This surely accords with the equitable considerations that the longshoreman should not lose his substantive right simply by reason of disinclination of the statutory assignee to sue" (11a).

The Court then directed a method of procedure to effectuate its opinion whereby the assignee would be joined as an involuntary plaintiff under F.R.C.P. 19 (a). (Under *Rodriguez* such procedure would not be employed.)

Thus the views expressed in *Caldwell* (4 Cir.) are in conflict with those expressed in *Rodriguez* (2 Cir.).

At this point it should be noted that in *Northeast Stevedores v. Caputo, supra,* this Court stated that the Act must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results. The Second Circuit ignored the purposes of the

Act; created a result relieving shipowner of the consequences of its negligence and then stated categorically that limiting the injured employee's time to sue to six months is not harsh,—even if the employer fails to sue thereafter. His substantive rights to recovery from the third party are simply lost by the mistaken belief that such loss is not harsh. Thus, by narrow statutory construction, ignoring the purposes of the Act, the injured employee is deprived of his claim for damages against the third party. The Second Circuit's interpretation of the Act makes it become a statute protecting the steamship company whose fault caused the accident and who by economic means, controls the actions of the stevedore, to the detriment of the injured longshoreman, contrary to Congressional intent.

Thus the conflict between the Second Circuit on one hand and the Third, Fourth, Fifth and D.C. Circuit Courts on the other is sharp and complete. To avoid the harsh result decreed by the Second Circuit and to make the Circuit Courts comply with the purposes of the Act as suggested by *Northeast Stevedores v. Caputo, supra,* the Writ of Certiorari requested herein should be granted.

Although the effect of the conflict of interest on the application of the Statute is overriding, the administration of the Act is vitally affected by the holding of the Second Circuit that a claims examiner may enter a compensation order. It is contrary to the Federal Regulations and the Act. See 20 C.F.R. 701.301 (a); 802.2 (a) and 33 U.S.C. 908 (i). While the Director of the O.W.C.P. may authorize anyone to enter an order, the Deputy Commissioner who has the right by statute to enter an order may not authorize anyone else to do so for him. The Court in *Rodriguez* confused the Director with the Deputy Commissioner. In *Rodriguez* the claims examiner was not authorized by the Director to enter an order. We have, therefore, no triggering of the six-month period for a statutory assignment.

Nor should an off-hand report of a settlement be considered an order which has considerable import. See *Intercounty Construction Corporation et al. v. Noah C.A. Walter, etc.*, 422 U.S. 2, 95 S.Ct. 2016.

Conclusion

For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should issue to review and reverse the decision below.

Respectfully submitted,

MORRIS CIZNER,
Attorney for Petitioner.

APPENDIX A.

Decision of United States Court of Appeals, Fourth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1257

CHARLES A. CALDWELL,

Appellant,

—versus—

OGDEN SEA TRANSPORT, Inc.,

Appellee.

No. 78-1258: Wilbert C. Harold, Appellant, versus Companhia De Navegacao Maritima Netumar, Appellee.

No. 78- : Melvin Bandy, Appellant, versus Bank Line, Ltd., Appellee.

No. 78-1455: James Braithwaite, Appellant, versus Moore-McCormack Lines, Inc., Appellee.

No. 78-1505: Wallace Curry, Appellant, versus Compania Crasatlantica Espanola, S.A., Appellee.

No. 78-1653: William Edward Sweeney, Appellant, versus Gotaas-Larsen Argentina, S.A., etc., *et al.*, Appellees.

Argued March 6, 1979 Decided March 27, 1980

Before

WIDENER and PHILLIP, Circuit Judges, and ROBERT R. MERHIGE, District Judge, sitting by designation.

C. Arthur Rutter, Jr., John H. Klein (Breit, Rutter & Montagna on brief), Burt M. Morewitz (Marshall, Blalock, Garner & Millner, W. Glover Garner, Jr.; Arthur C. Ermlich and Melvin J. Radin on brief) for Appellants; John B. King, Jr. (Vandeventer, Black, Meredity & Martin on brief), John R. Crumpler, Jr. (Seawell, McCoy, Dalton, Hughes, Gore & Timms on brief), Richard Wright West for Appellees.

* * *

II.

The longshoremen next contend that the right of action on the third person claim should be deemed concurrently held by longshoremen and subrogated insurers after passage of the six months limitation period. Were we writing on a clean slate, strong policy considerations might be found to support such a position. LHWCA should be interpreted broadly in favor of the injured longshoreman. *E. g., Voris v. Eikel,* 346 U.S. 328, 333 (1953). One of its objectives is to place "the burden ultimately on the company whose default caused the injury," *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964), and a negligent shipowner would seem to have no complaint if that burden is placed upon it by the longshoreman rather than the employer or its insurer. Courts have construed roughly comparable language in state workmen's compensation statutes to create a concurrent right to proceed against a third party tortfeasor. *E.g., Parkhill Truck Co. v. Wilson,* 190 Okla. 473, 125 P.2d 203 (1942). *See generally* 2A A. Larson, *The*

Law of Workmen's Compensation § 75.40 (1974). Indeed, cases under LHWCA itself arguably may have taken such a position. *See Clark v. Hutchinson,* 161 F. Supp. 35 (D.C.Z 1957); *cf. Potomac Electric Power Co. v. Wynn,* 343 F.2d 295 (D.C. Cir. 1965) (per curiam) (longshoreman may sue when "for any reason" stevedore or its insurer does not).

Be that as it may, we conclude that the history of the legislation we apply precludes that interpretation. We do not write on a clean slate. While the longshoreman's right of action against negligent third persons has always been protected by LHWCA, he was required under the original version to elect between compensation or a right of action against the third party.[3] When the longshoreman elected compensation, he gave up any interest in the third party action or control over it. *Hunt v. Bank Line, Ltd.,* 35 F.2d 136, 137 (4th Cir. 1929). Absent such a formal election he could in theory also have pursued his third party claim, but the original version of § 933(b) made this impossible.[4]

[3]As originally enacted, and until 1959, § 933 (a) read:

> If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commisioner in such manner as the [Secretary of Labor] may provide, to receive such compensation or to recover damages against such third person.

Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33 (a), 44 Stat. 1424, 1440 (1927).

[4]The original § 933(b) provided:

> Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person whether or not the person entitled to compensation has notified the deputy commissioner of his election.

Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33(b), 44 Stat. 1424, 1440 (1927).

The courts held that the mere acceptance of compensation, even without a formal election, effected an assignment of the right of action to the employer. *E.g., Toomey v. Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941). *But see Johnsen v. American-Hawaiian S.S. Co.*, 98 F.2d 847 (9th Cir. 1938).

In 1938, Congress acted to mitigate this deficiency. Section 933(b) was amended to provide that an assignment would occur only if the compensation was accepted "under an award in a compensation order filed by the deputy commissioner."[1] The amendment was successful in that the longshoreman who did not file a formal election and merely received voluntary payments without an award was thereafter allowed to pursue his third party claim. *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 456 (1947).

The statute was not yet completely functional, however, for as a practical matter the longshoreman was still compelled to look essentially to the compensation payments. Third person liability was uncertain and always delayed. The longshoreman was entitled to the difference between any recovery obtained by the assignee and the amount paid under the Act plus the litigation expenses, Act of June 25, 1938, ch. 685, § 12, sec. 33(e), 52 Stat. 1164, 1168, *amending* Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33(e), 44 Stat. 1424, 1440-41 (1927), but the assignee as it still can, could settle the claim

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[1]From 1938 until 1959, § 33(b) provided:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

Act of June 25, 1938, ch. 685, § 12, 52 Stat. 1164, 1168.

for its outlay without the consent of the longshoreman, 33 U.S.C. § 933(d), and there was no incentive for it not to do so. *See* S. Rep. No. 428, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code Cong. & Ad. News 2134.

In 1959, therefore, Congress again amended § 933 to its present form to eliminate the election requirement under subsection (a), to postpone the assignment under subsection (b) until six months after acceptance of compensation under an award, and to give twenty percent of any excess recovery by the assignee to the assignee as incentive to bring the third party action. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391.

If, as appellants contend, the right of action against third person tortfeasors becomes concurrent when the assignment occurs, much of this legislation was unnecessary. The 1938 amendment adding the award requirement to § 933(b) need never have been enacted; the judicial decisions barring suit by the longshoremen before that amendment were incorrect; and the 1959 amendment postponing the assignment six months was essentially superfluous. On balance we conclude that whatever might be the merits of a concurrent right of action approach, LHWCA will not yield that interpretation.

III.

The longshoremen next contend, in a fall back position from the two just discussed and rejected, that where a conflict of interest on the part of an assignee of the third person claim can be shown, the right of action should be deemed reassigned to the longshoreman. The district court held, relying on *Czaplicki v. The Hoegh Silvercloud,* 351 S. 525 (1956), that proof of such a conflict of interest could have this effect, but that the burden of proof to

establish the conflict should be borne by the longshoreman. When none of the longshoremen, despite opportunity given to carry this burden, was found to have done so, judgments for the third person defendants of course followed.

On this appeal the longshoremen urge that a presumption of conflict should arise from the mere failure of an assignee to bring a third person action, thereby imposing upon the third person when sued the burden of negating the existence of a conflict. To the contrary, defendants here contend that the conflict of interest principle announced in *Czaplicki* should be considered abrogated by subsequent legislation in 1959 and 1972 which, by removing existing disincentives for assignees to prosecute third person claims, effectively removed the originally felt need for the amelioration that *Czaplicki* provided.

We agree with the longshoremen and the district court that the *Czaplicki* doctrine has not been undercut by subsequent legislation.[6] But we consider its conflict of interest principle as applied by the district court to be so

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[6]The argument that the 1959 and 1972 amendments have *sub silentio* abrogated *Czaplicki* are based on the assumption that the decision was justified only by certain disadvantages for longshoremen theninherent in LHWCA that have since been removed by these amendments. The 1959 amendment postponed the assignment for six months and gave assignees an added incentive to prosecute claims by providing them a bounty of twenty percent of any excess recovery. Act of August 18, 1959, Pub. L. No. 86-171, §33(b), (e), 73 Stat. 391. The 1972 amendments removed critical disincentives to suit by assignees by abolishing the breach of warranty claims against employers by shipowners and longshoremen that were then available under *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and *Reed v. The Yaka*, 373 U.S. 410 (1963). *See* 33 U.S.C. §905(b). With the district court in the instant cases, we do not consider the *Czaplicki* principle to have been rendered unnecessary by these amendments. While both undoubtedly improve longshoremen's chances of recovery on third person claims in the aggregate of compensation cases, neither solves the problem of assignee inaction when it occurs in a particular case.

demonstrably ineffectual to carry out the purposes of LHWCA in respect of third person claims that it must be reassessed. When this is done, we think that a solution building upon the underlying *Czaplicki* principle but more fairly serving the various individual interests as well as the purposes of LHWCA is readily found within broader, traditional principles of subrogation and real party in interest doctrine.

The ineffectiveness of specific conflict of interest principles as applied in these cases and the more appropriate solution available within established doctrine may be illustrated by analyzing the practical problems faced by both longshoreman, assignee, and third person after statutory compensation has been paid under the Act. At this point both longshoreman and assignee of course have an interest in realizing on any claim that may exist against a negligent third person: the assignee to recoup, the longshoreman to recover amounts in excess of, compensation paid. The third person presumably has no substantial interest in the identity of the ultimate claimant, but does have an interest in facing only one action. Were the statutory assignment scheme not in play, both parties might be considered "real parties in interest" under traditional subrogation principles, and the rights *inter se* of these two and any third person target of suit would be adequately served by well-developed principles that protect the third person against multiplicity of actions while safeguarding the separate substantive claims of the claimants. *See generally* 6 Wright & Miller, *Federal Practice and Procedure: Civil* §§ 1545, 1546. But the assignment-subrogation scheme of §933 of course operates precisely to alter that normal three-way relationship resulting from subrogation in respect of third person claims. Under §933 the longshoreman is made the sole real party in interest for six months; the assignee the sole real party in interest thereafter. This statutory scheme assumes that in the normal course a longshoreman with a

meritorious third person claim will know of it and will make a considered decision either to prosecute it for the joint interests as the statutory real party in interest during the six months period or to defer to the assignee as successor real party in interest. It further assumes that in the normal course an assignee will within the statutory limitation period prosecute for the benefit of both any claim not prosecuted by the longshoreman. To encourage realization of this latter expectation, LHWCA now provides a financial incentive to the assignee to prosecute the action, and has removed the former disincentives to suit resulting from judicial glosses on the Act.[7] Ordinarily, therefore, it is likely that the interests of both longshoreman and assignee in having their substantive rights pursued and of the third person in facing a single action will be achieved under LHWCA.

But LHWCA does not yet deal directly with certain practical problems that may interrupt or wrench these expectations. These can arise whenever by design or inadvertence the longshoreman fails during the statutory period to prosecute the claim while the right of action is exclusively his. Following this failure, the assignee may, for a variety of reasons, not then itself prosecute the claim. It may not consider a claim thought meritorious by the longshoreman to be sufficiently so to warrant the expense of litigation. It may have a specific conflict of interest that militates against prosecuting the claim. It may simply be dilatory to the point that the claim is threatened by a limitations bar. Under all of these, and to precisely the same degree under all, the longshoreman faces a practical problem for which LHWCA provides no direct solution: forcing action by the assignee, or somehow retrieving the right of action. While LHWCA does not specifically provide the solution, it certainly cannot be thought to have been intended by Congress that the longshoreman's substantive right might be lost simply

[7] *See* note 6, *supra*.

through inaction of the assignee until the claim is barred from prosecution by anyone. What is needed is a solution that adequately protects the assignee's first right of exclusive action but that also protects the longshoreman's substantive right against loss through inaction of the assignee for whatever reason.

The concurrent right of action approach taken by some courts is an attempted solution along these lines. As indicated in Part II, we do not think the legislative history of LHWCA permits finding such a solution within the Act. Furthermore, a truly concurrent right possessed by the longshoreman would be in derogation of the normally justifiable right of the assignee, who usually has the greater substantive interest at stake, to maintain exclusive control over the action.

The conflict of interest principle found in *Czaplicki* is another possible basis of solution. It has proven however to pose two problems that have made it difficult of general application. The first is substantive: its implication that the conflict of interest must be one specifically related to the assignee's relationship with the third person. The second is procedural: the problem of allocating proof on the issue of the assignee's conflict of interest as between the longshoreman and the third person, the actual litigants in the third person action. On its facts, *Czaplicki,* origin of the principle, simply did not encounter either of these as significant problems. Substantively the conflict of interest in *Czaplicki* was the clearest conceivable: the assignee insurer was also insurer of the third person shipowner. Procedurally, because the existence of conflict was manifest as a matter of law, no problem of factual proof was presented.

Courts attempting to apply the *Czaplicki* principle in situations less clear in either substantive or procedural terms have foundered in the effort to find in it a general

solution to the problem. To the extent it was going to require a specific conflict of interest in the sense that affirmative interest by the assignee in protecting the third person, it could not of course reach mere disinclination of the assignee to sue because of expense or doubt as to the merits, of failure to sue because of negligence or inadvertence.[8] To the extent a conflict was not manifest in the circumstances but required factual proof, the problem of allocating to either longshoreman or third person the burden of proving another's state of mind has presented obvious and possibly insurmountable difficulties.[9]

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[8]While the district court in the instant cases rejected the notion that *Czaplicki* had been utterly abrogated or that its principle should be confined to its narrow facts of identity of insurers of employer and third person, it clearly thought that only a specific conflict of interest could suffice to revest the right of action in the longshoreman. *See also McClendon v. Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965). *But see Potomac Elec. Power Co. v. Wynn*, 343 F.2d 295 (D. C. Cir. 1965) (revested if "for whatever reason" assignee does not sue; *semble*).

[9]Courts addressing the problem have simply divided on the appropriate allocation. The Third Circuit in *Johnson v. Sword Line, Inc.*, 257 F.2d 541 (3d Cir. 1958), suggested, somewhat ambiguously it must be conceded, that the assignee (a non-party?) should bear the burden. Subsequent cases have read through the ambiguity an implied holding in *Johnson* that the burden of proof should be carried by the third person tortfeasor. *See Smith v. A.H. Bull S.S. Co.*, 208 F. Supp. 172, 177 (D. Md. 1962) (following *Johnson*). *See also Potomac Elec. Power Co. v. Wynn*, 343 F.2d 295, 198 (D.C. Cir. 1965) (*semble*, if any degree of conflict need be proved burden should be upon defendant). On the other hand the district court in the *Bundy* case involved in this appeal held that the burden of proving conflict of interest should be carried by the longshoreman attempting thereby to overcome the statutory assignment. *Bandy v. Bank Line, Ltd.*, 442 F. Supp. 882, 887 (E.D. Va. 1977). Several courts have followed *Bandy*. *Rodriguez v. Compass Shipping Co.*, 456 F. Supp. 1014, 1023 (S.D.N.Y. 1978); *Tagliarini v. McAllister Lighterage Lines, Inc.*, Ind. No. 20915177 (N. Y. Sup. Ct., N. Y. County, Mar. 19, 1979).

This divergence of views on so critical a point simply reflects the inherent difficulty in placing upon either party to litigation the decisive burden of proving the motivation for inaction of a non-party. *See, e.g., McClendon v. Charente S.S. Co.*, 348 F. 2d 298, 303 (5th Cir. 1965); *Smith v. A.H. Bull S.S. Co.*, 208 F. Supp. at 177.

As indicated, we think that a solution building on the fundamental point in *Czaplicki,* but avoiding both of these problems is readily at hand. The fundamental point in *Czaplicki* is that notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman when it becomes manifest that the assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason. This surely accords with the equitable considerations that the longshoreman should not lose his substantive right simply by reason of disinclination of the statutory assignee to sue, and that a deliberate decision by the latter to forego the exclusive right to control prosecution of the claim must reflect a knowledgeable relinquishment of right.

Taking this as the root *Czaplicki* principle, only two things need be done to invoke its application in a particular case. The longshoreman must formally signal to the assignee a desire to have the claim prosecuted by the latter at peril of having the exclusive right of action revested in the former, and the assignee must in return formally signal its disinclination to prosecute the action.

The practical and procedural means for realizing these are also readily found. A longshoreman desiring to force decision can of course first proceed extra-judicially to request action by the assignee or, as an alternative, formal reassignment of the right of action. As we indicate in Part IV of this Opinion, a formal reassignment will be effective to revest the exclusive right of action in the longshoreman. If this fails, the longshoreman may commence an action on the third person claim in his own name, as was done in the actions before us. In this action he may join the assignee as an involuntary plaintiff, Fed. R. Civ. P. 19(a), alleging the essential facts of the three parties' relationship, and praying that the assignee assume exclusive con-

trol of the action's prosecution.[10] A specific refusal in a responsive pleading to assume control, or a failure specifically to respond to this prayer for relief may fairly be treated as a reassignment in accordance with the equitable considerations underlying the *Czaplicki* principle. If the assignee on the other hand asserts by responsive pleading an intention to assume control of the prosecution, this should be taken to constitute acceptance of an obligation to prosecute it in diligence and good faith.

Because we conclude that invocation of the *Czaplicki* principle should not depend upon proof of the existence of a specific conflict of interest, the judgment entered on that basis in favor of the defendants in each of the instant actions must be vacated and the actions remanded for further proceedings. Upon remand, all plaintiffs covered by LHWCA may, if so disposed, amend their complaints to add as involuntary plaintiffs the subrogated assignees in their respective actions, and thereafter may proceed in accordance with the procedures outlined in this opinion.[11]

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[10]It is of course possible that in an occasional case territorial limitations on jurisdiction will prevent joining the assignee as a formal party. In such a case documented extra-judicial notice with fair opportunity to respond may fairly serve the purpose by analogy to traditional vouching-in procedures. Formal joinder is so much better adapted for a variety of reasons that a court might well insist upon its use whenever available. We leave that problem to another day.

[11]The relation back provisions of Fed. R. Civ. P. 17(a) are available to resolve any problem arising from late joinder of the real party in interest.

APPENDIX B.

Decision of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 362—September Term, 1979

(Argued December 6, 1979 Decided March 19, 1980)

Docket No. 79-7132

FREDERICO RODRIGUEZ,

Plaintiff-Appellant,

—against—

COMPASS SHIPPING CO. LTD. and DJAKARTA LLOYD, P.N.,

Defendants-Appellees.

Before:

WATERMAN, MOORE, and MANSFIELD,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, entered by Judge Robert L. Carter, dismissing a personal injury action by a longshoreman against a shipowner and bareboat charterer on the ground that the plaintiff had, pursuant to a settlement agreement with his employer, approved

by a claims examiner of the Department of Labor, received workmen's compensation pursuant to the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C. §§901, *et seq.*, and by failing to bring suit against the defendants within six months thereafter assigned his rights to his employer under § 33 (b) of that Act, 33 U.S.C. § 933(b).

Affirmed.

MORRIS CIZNER, Esq., New York, NY (Zimmerman & Zimmerman, New York, NY, of counsel), *for Appellant.*

JOSEPH T. STEARNS, Esq., New York, NY (William J. Blumenschein, Esq., Walker & Corsa, New York, NY, of counsel), *for Appellees.*

MANSFIELD, *Circuit Judge*:

This is one of a series of personal injury actions by longshoremen against shipowners or charterers, nearly all of which have been dismissed by district courts pursuant to § 33(b) of the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 933(b) on the ground that since the plaintiff in each case settled a compensation claim filed by him against his employer (a stevedoring company) under the Act, accepted the agreed-upon sum, and failed to sue the shipowner until more than six months after the settlement award, he lost his right to assert the claim which was by operation of § 33(b) automatically assigned to

his employer. See also *Panzella v. Skou*, 471 F. Supp. 303 (S.D.N.Y. 1979); *Francavilla v. Bank Line, Ltd.*, 470 F. Supp. 94 (S.D.N.Y. 1979); *Perez v. Arya National Shipping Line, Ltd.*, 468 F. Supp. 799 (S.D.N.Y. 1979); *Hernandez v. Costa Armatori*, 467 F. Supp. 1064 (E.D.N.Y. 1979); *Perez v. Costa Armartori*, 465 F. Supp. 1211 (S.D.N.Y. 1979); *Bandy v. Bank Line Ltd.*, 442 F. Supp. 882 (E.D. Va. 1977).

Section 33(b) provides that

> "(b) Acceptance of [statutorily fixed] compensation under an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

An employer successfully bringing suit against a third party following a statutory assignment must pay the proceeds to the employee; keeping for itself the amount of compensation it paid, attorney's fees, and 20% of the balance. 33 U.S.C. § 933(e). If the employee brings suit himself, he must repay his employer out of the proceeds, retaining the balance of the damage recovery. *The Etna*, 138 F.2d 37, 41 (3d Cir. 1943).

Plaintiff contends that since his claim under the Act was not the subject of a formal compensation order filed by the deputy commissioner or Board no assignment occurred and his action is neither precluded nor time-barred. He further argues that, even assuming an assignment, since the employer has no intention of prosecuting the claim against the shipowner any as-

signment of his claim under the terms of the Act must be treated as null and void because of a conflict between his interest and that of his employer. We disagree on both counts and affirm.

On September 4, 1973, plaintiff, a longshoreman employed by the stevedoring company International Terminal Operating Co., Inc. (International), was injured while unloading the S.S. South Breeze, docked in Brooklyn, which was owned by Compass Shipping Company and operated by Djakarta Lloyd as bareboat charterer. Pursuant to § 5(b) of the Act, 33 U.S.C. § 905(b), he filed a workmen's compensation claim against his employer International, which was self-insured, with the Office of Workers' Compensation Programs (OWCP), U.S. Department of Labor. The statute provides for compensation in fixed amount by the employer regardless of fault.

Under regulations implementing the Act, see 20 C.F.R. §§ 702.311-314, a claims examiner employed by the Department of Labor convened an informal conference. At the conference plaintiff and his employer reached an agreement settling plaintiff's claim, which was then memorialized in a written agreement dated November 4, 1974, on an OWCP form regularly used for this purpose. Plaintiff was represented by counsel throughout the OWCP proceedings, the employer had its representative, and the matter was handled by the claims examiner pursuant to 20 C.F.R. § 702.312 which authorizes an informal conference to be called by the deputy commissioner or his designee. Title 20 C.F.R. § 702.312, which has since been revised, provided:

> "§ 702.312 Informal conference; called by and held before whom.

"Informal conferences shall be called by the deputy commissioner or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned, the designee shall perform the duties set forth below assigned to the deputy commissioner."

The settlement agreement was signed by the plaintiff, his representative, the employer's representative and the claims examiner. The parties agreed as to the extent of plaintiff's disability, the amount of money due him and the amount of his counsel's fee. Payment of the agreed-upon amount was made promptly by the employer to plaintiff pursuant to the terms of the agreement. Title 20 C.F.R. § 702.315, as it read at the time of the settlement, obligated the employer to commence paying the compensation benefits immediately, without regard to whether the deputy commissioner, acting personally or through his designee, see 20 C.F.R. § 702.312, *supra*, had filed a formal compensation order, which he was required to do. Title 20 C.F.R. § 702.315 provided:

"§ 702.315 Conclusion of conference agreement on all matters with respect to the claim.

"(a) Following an informal conference at which agreement is reached on all issues, the deputy commissioner shall embody the agreement in a formal compensation order, to be filed and mailed in accordance with § 702.349. Where the problem was of such nature that it was resolved by discussion by telephone or by exchange of written correspondence, the parties shall be notified by the same means that agreement was reached and then

> the deputy commissioner shall proceed to prepare, file and mail the formal compensation order. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without regard to the receipt of the formal compensation order."

Following the execution of the settlement agreement, neither the deputy commissioner nor his designee filed and mailed a formal compensation order.

On July 2, 1977, plaintiff commenced the present action in the Southern District of New York against the shipowner (Compass Shipping Co. Ltd.) and bareboat charterer (Djakarta Lloyd, P.N.) after an earlier suit had on June 2, 1976, mistakenly been instituted in the same court against the shipowner only and was apparently dropped. On April 21, 1978, the defendants moved for summary judgment based on plaintiff's failure to sue within six months of the settlement agreement as required by 33 U.S.C. § 933(b).

On September 12, 1978, Judge Carter filed an opinion, 456 F. Supp. 1014, holding that the settlement agreement amounted to an order within the meaning of § 33(b), requiring plaintiff to sue within six months unless he could show that that section should not be applied because of a conflict of interest between himself and his employer with respect to the institution of a personal injury suit against the shipowner or charterer, see *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525 (1956). Plaintiff was given 60 days within which, through use of discovery proceedings, to demon-

strate a conflict. When plaintiff failed to adduce evidence other than his attorney's affidavit to the effect that the employer had a policy of not prosecuting actions based on a § 33(b) assignment, the district court granted summary judgment, dismissing the complaint on the ground that plaintiff's rights against the defendant had been assigned to his employer pursuant to § 33(b) by reason of his failure to bring suit against them within six months after the settlement. From this judgment plaintiff appeals.

DISCUSSION

Appellant's threshold contention that defendants have no "standing" to raise the assignment defense because the shipowner's liability is unaffected by the assignment need not take us long. The argument is clearly without merit.

The defense raised by the defendants, that plaintiff is not the real party in interest, may always be invoked pursuant to F.R. Civ.P. 17(a), which provides that every action shall be prosecuted in the name of the real party in interest. Without this defense a defendant might be exposed to multiple suits based on the same claim. *United Federation of Postal Clerks v. Watson*, 409 F.2d 462, 470 & n.34 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1969). A person, such as the employer here, to whom a claim has been assigned under § 33(b), is the real party in interest. *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530 (1933); *Moore v. Hechinger*, 127 F.2d 746 (D.C. Cir. 1942). Assuming the assignment here to be valid, the right to sue is exclusively that of the employer, which has not joined in the action or ratified its commencement even though it has had a reasonable

time to do so. The defense of assignment therefore is properly asserted as a procedural matter by the defendants.

Turning to the merits, the first question is whether the settlement agreement amounted legally to an "award in a compensation order" of the deputy commissioner or [Workmen's Compensation] Board within the meaning of § 33(b), triggering its assignment provisions. Plaintiff first argues that the award must be approved by the deputy commissioner and that a claims examiner will not suffice. We disagree.

Section 39(a) of the Act, 33 U.S.C. § 939(a), empowers the Secretary of Labor to make such rules and regulations "as may be necessary in the administration of this chapter." Almost identical language has been construed by the Supreme Court to permit an official to delegate duties, *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947), and it is generally accepted in this day and age that a governmental administrator vested with such authority may delegate unless expressly forbidden by statute or by the inconsistency of such a delegation with the purposes of the statute. *E.E.O.C. v. Raymond Metal Products Co.*, 530 F.2d 590, 594 (4th Cir. 1976), 1 K. Davis, Administrative Law Treatise, § 3.18 (2d ed. 1978). Without the power to delegate the director or deputy director of large divisions of a government department would be hampered in the performance of his multifarious duties.

No sound reason is advanced by plaintiff here in favor of a narrow construction of the Act that would forbid such delegation. A claims examiner, well versed in the factors to be considered in protecting a claimant's right to adequate compensation, is in just as

advantageous a position as a deputy director to determine whether a settlement is in the best interest of an injured employee entitled to compensation. Nothing in the history of the statute indicates that Congress' purpose was to insure the exercise of the personal discretion of the deputy commissioner as distinguished from that of a duly qualified designee. We therefore hold that under the regulations in effect at the relevant time, an agreement settling an injured employee's claim to workmen's compensation, signed after an informal conference with a claims examiner, by whom it was approved, constitutes an "award" within the meaning of § 33(b).[1]

In support of his contrary interpretation appellant relies on earlier decisions holding that, although the formality of an order is not required, *Toomey v. Waterman S.S. Corp.*, 123 F.2d 718, 721 (2d Cir. 1941), a settlement agreement signed by a claims examiner is insufficient to satisfy the requirement of § 33(b) and that it does not become an award until signed by a deputy commissioner. *Grasso v. Lorentzen*, 149 F.2d 127, 129 (2d Cir.), *cert. denied*, 326 U.S. 743 (1945); *Sessa v. Weeks Stevedoring Co.*, 56 F. Supp. 50 (S.D.N.Y. 1943). These decisions, however, represented an effort to relieve claimants from the harshness of the Act as it existed prior to the 1959 amendments which govern the present case.

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1 The regulations were revised effective September 9, 1977, subsequent to the relevant events in this lawsuit. As now written, 20 C.F.R. § 702.312 provides that while an informal conference may be called by "the deputy commissioner or his designee," a compensation order following an agreement may be issued only by a person designated by the Director of OWCP. Previously, such an order could be filed by anyone empowered to call the informal conference. We need not determine whether our result would differ had the settlement taken place after the new regulations took effect.

Prior to 1959, the right to sue third parties was assigned to the employer as soon as a settlement was reached. This forced an injured employee to elect at once between immediate compensation and delays and uncertainties of litigation at a time when he had cash flow problems. Many courts therefore invoked every available technicality to avoid finding an assignment.

Congress in 1959 amended § 33(b) to permit the employee to receive a statutory compensation award which would not operate as an assignment unless he failed to sue within six months. S. Rep. No. 428, 86th Cong., 1st Sess., reprinted in 1959 U.S. Cong., & Admin. News 2134-35. With the elimination of the harshness that prompted *Grasso* and *Sessa*, the Act as it stood at the time of the events here should be construed "from the realities of the situation rather than by the labels employed," *Sabol v. Merritt Chapman & Scott Corp.*, 241 F.2d 765, 767 (2d Cir. 1957). We see no reason to prevent the OWCP from allowing a claims examiner to approve settlements.

Appellant's next contention is that since neither the deputy commissioner nor the claims examiner filed a formal compensation order, there was no assignment under § 33(b). We disagree. The purpose of the provision for filing of an order was to insure that the claimant-employee knew that he was foregoing his right to sue by acceptance of the compensation agreement. H. Rep. No. 1945, 75th Cong., 3rd Sess. at 9 (1938). Where, as here, the employee, upon signing the compensation agreement with the assistance and co-signature of his counsel, is fully aware of his rights, including his right to sue within six months, the failure of an administrator to comply with the formality imposed by departmental regulations (20 C.F.R.

§ 702.315, *supra*) of filing the formal order can have no significance as far as the substantive rights of the parties are concerned. The employer's obligation to start paying compensation to the employee commences immediately upon signing of the agreement. To delay the operation of § 33(b) until the filing of an order would be to exalt form over substance. Accordingly, we conclude that under the regulations as they existed prior to September 9, 1977, which are the regulations applicable to this case, § 33(b) applied and operated to assign to appellant's employer his right to sue the shipowner.[2]

Notwithstanding the applicability of § 33(b), appellant, relying principally upon *Czaplicki v. The S.S. Hoegh Silvercloud*, 351 U.S. 525 (1956), contends that since the employer does not propose to sue the defendants, the assignment should be invalidated as a matter of public policy and appellant should have been permitted to bring suit more than six months after the compensation award. We disagree.

It is true that if the employer brought suit against the shipowner and recovered it would, after deduction from the proceeds of any compensation payments made to the employee plus attorney's fees in effectuating the recovery, be obligated to pay 80% of the balance to appellant and permitted to retain 20% for itself. To

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2 Effective September 9, 1977, 20 C.F.R. § 702.315 provides that a formal compensation order need not be filed unless either the employer or the employee requests it. It may be argued that under this new provision, the filing of an order has become more than a formality—the employer who fails to request an order may be waiving his right to assignment of the claim. Since the new regulations were not in effect at the time of the settlement of this claim or within six months thereafter (when the assignment became effective), we need not determine whether the change would affect the result in a case such as this.

this extent the employee has an interest conflicting with that of the employer, which often chooses not to antagonize its customer, the shipowner, by bringing a suit against it. See *Valentino v. Rickners Rhederei, G.M.B.H.*, 552 F.2d 446 (2d Cir. 1977). The simple answer is that appellant was afforded six months to bring his own suit against the shipowner, free and clear of any control by the employer, but chose not to do so. We do not view the six months time bar as unreasonable or harsh under the circumstances.

Czaplicki is clearly distinguishable and, as we pointed out in *Sabol v. Merritt Chapman & Scott Corp.*, 241 F.2d 765, 768 (2d Cir. 1957), "was carefully limited by the court to the peculiar situation there presented." It was decided prior to the 1959 amendments of § 33(b). At that time the employee, upon entering into a settlement agreement with his employer and accepting compensation, immediately lost any right to sue the shipowner, since that right, by assignment, became exclusively the right of the employer. However, in *Czaplicki* the employer's insurer, which by subrogation acquired the employer's exclusive assigned right to sue, was also the shipowner's insurer. Thus, if the insurer brought suit it would as a practical matter not only be suing itself but also be under an obligation to turn over 80% of any recovery in excess of compensation payments and attorney's fees to the employee. In the absence of any right at all on the part of the employee to sue the shipowner, the Supreme Court understandably held that the conflict of interest was sufficient to nullify the assignment, noting that "Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced," 351 U.S. at 530. Even in the

absence of a common insurer, the prospect of a conflict between the interest of the employee and that of his employer with respect to the institution of suit against the shipowner arose as a result of the Supreme Court's decision five months earlier in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956), that a shipowner held liable for injuries to a longshoreman could recover over against the employer-stevedore for breach of the latter's obligation to perform its duties safely. As a result, an employer suing the shipowner upon the employee's assigned claim might be met with the defense that the employer was ultimately liable. Thus the employer, unlike its employee, had no interest in pressing the assigned claim against the shipowner after payment of compensation and the employee, by virtue of the assignment, had lost any right to do so.

This state of affairs was changed by the 1959 amendments to § 33(b), which gave the employee six months within which to sue. It was further alleviated by Congress' amendment in 1972 of § 5(b) of the Act, 33 U.S.C. § 905(b), which eliminated an employer's liability to a shipowner under the principles of *Ryan Stevedoring Co.* Moreover, had Congress desired when it amended the Act to give both the employee and the employer the right concurrently to sue the shipowner, nothing prevented it from doing so. Instead it chose to give the employee six months within which to bring such a suit and if the employee failed to do so within that period to assign the right exclusively to the employer. We are bound by that enactment. Although *Czaplicki* was applied in a few cases postdating the 1959 amendments to the Act, see, e.g., *McClendon v. Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965); *Poto-*

mac Electric Power Co. v. Wynn, 343 F.2d 295 (D.C. Cir. 1965), we prefer, in view of the later changes in the Act, to treat *Czaplicki* as limited to its unique facts, which are not presented here.

The judgment of the district court is affirmed.